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United States District Court  
Eastern District of Washington  
Honorable Rosanna M. Peterson

United States of America,

Plaintiff,

v.

Marciano Munoz-De La O,

Defendant.

No. 2:20-CR-00134-RMP

**Response to Supplemental Authority**

1 The government provided the Court with a recent decision from the Southern  
2 District of Texas.<sup>1</sup> The government uses this decision for the proposition that a  
3 separate district court ruled adversely after having considered Dr. Kang's affidavit.<sup>2</sup>  
4 That case differs for two reasons:

- 5 1) The S.D. Tex. court did not have the benefit of several hours of testimony from  
6 Dr. Kang; and
- 7 2) The S.D. Tex. court lacked access to several key documents filed before this  
8 Court.<sup>3</sup>

9 The S.D. Tex. court was therefore working from a less-developed record. This less-  
10 developed record showed in the court's decision.

11 Most importantly, the S. D. Tex. court found there was no "evidence that the  
12 100th Congress was motivated by a discriminatory intent in enacting the penalty  
13 provision in §1326(b) in 1988."<sup>4</sup> Before this Court, Dr. Kang testified as to the  
14 evidence that the 1988 Congress acted with racial animus when it amended §1326.<sup>5</sup>

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15 <sup>1</sup> *U.S. v. Hernandez-Lopez*, S.D. Tex. Case no. 4:21-cr-440.

16 <sup>2</sup> ECF No. 89 at 1.

17 <sup>3</sup> The documents filed in this case but not before the Southern District of Texas are ECF Nos. 61-  
18 9, 61-10, 61-12, 61-17, 78-4, 78-6, 78-7, and 78-8. Those documents include records of  
19 congressional hearings in which Sen. McCarran used the racial slur "wetback," records of other  
Congresspeople making overtly racist statements, and testimony on the Senate floor that the 1988  
amendment to §1326 would be counterproductive to immigration policy objectives.

<sup>4</sup> ECF No. 89-1 at 12.

<sup>5</sup> Notably, the government in this case has not suggested Mr. Muñoz must show Congress acted  
with racial animus when it amended §1326. Rather, the government argues Congress's amending

1 Also importantly, the S.D. Tex. court’s limited discussion of Dr. Kang’s  
 2 affidavit focused on her acknowledgment that the 1952 Congress did not spend much  
 3 time debating the recodification of §1326.<sup>6</sup> Before this Court, Dr. Kang testified that  
 4 relative silence in the legislative record does not in any way preclude a finding of racial  
 5 animus and detailed the evidence supporting her conclusion that the 1952 Congress  
 6 did act with racial animus when it recodified §1326.

7 Finally, the S.D. Tex. court discounted Deputy Attorney General Peyton Ford’s  
 8 use of the racial slur “wetback” because Ford was not a member of Congress and  
 9 therefore “his use of the racial epithet does not provide evidence of Congress’s intent  
 10 in reenacting §1326” in the McCarran-Walter Act.<sup>7</sup> The clear implication is that a  
 11 Congressperson using a racial slur would be evidence of congressional intent. Before  
 12 this Court, Dr. Kang testified that Sen. McCarran regularly called Latinxs “wetbacks”  
 13 and that Rep. Walter was a member of a eugenicist organization.

14 In short, the findings of the S.D. Tex. court should not concern this Court. This  
 15 Court has before it a significantly more fulsome record, with key evidence that was not  
 16 before the S.D. Tex. court.

17 \_\_\_\_\_  
 18 of §1326 is evidence that Congress would have enacted §1326 “regardless of any racially  
 19 discriminatory motivation.” ECF No. 64 at 26. That is, the government relies on the amendments  
 only to carry its burden under *Arlington Heights* should the Court determine Mr. Muñoz has made  
 his threshold showing of disparate impact and racial animus.

<sup>6</sup> ECF No. 89-1 at 8.

<sup>7</sup> ECF No. 89-1 at 9.

1 Dated: February 10, 2022.

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8 **Service Certificate**

9 I certify that on February 10, 2022, I electronically filed the foregoing with the  
10 Clerk of the Court using the CM/ECF System, which will notify Assistant United  
11 States Attorney: Michael Ellis.

12 s/ Payton B. Martinez

13 Payton B. Martinez, CO # 55240